No. 18805

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOMER L. WOXBERG, SR., and WAYNE FRANKLIN DYKES,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

Statement of Pleadings and Facts Disclosing Jurisdiction.

The prosecution in the courts below was based upon a twenty count indictment returned by the Federal Grand Jury for the Southern District of California on September 5, 1962, which charged in substance that on twenty occasions occurring during 1959, 1960 and 1961, Homer L. Woxberg, Sr., Wayne Franklin Dykes, Donald V. Hester and Hobart A. Barnes, wilfully embezzled, stole, abstracted and converted to their own use and the use of others money, funds, securities, property and assets of Line Drivers Local 224 of the Teamsters Union, in violation of Section 501(c) of Title 29, United States Code. Appellant Woxberg was named in Counts One through Nineteen. Appellant Dykes was

named in Counts One through Twenty. The co-defendant Hester was named in Counts One through Seven, and Nine through Fifteen. The co-defendant Barnes was named only in Counts One, Two, Sixteen, Seventeen and Eighteen [C. T. 2].[1]

On October 8, 1962, the defendants each entered a plea of not guilty to each count [C. T. 4]. On February 5, 1963, after numerous pre-trial motions [C. T. 24-25] trial by jury commenced before the Honorable Harry C. Westover, United States District Judge [C. T. 100].

After approximately six weeks of trial each of the defendants, Woxberg, Dykes, Hester and Barnes, was found guilty as to Counts One and Two of the Indictment. In addition the appellant Woxberg was found guilty as to Counts Nine and Ten of the Indictment [C. T. 195-196].

On April 8, 1963, appellants Woxberg and Dykes were each sentenced to the Custody of the Attorney General for three years on each Counts One and Two, such sentences to run concurrently; they were made eligible for parole pursuant to 4208(a)(2) and fined $10,000 on Count One and $1,000 on Count Two. Woxberg was also fined $1,000 on each Counts Nine and Ten [C. T. 208-209].

On April 10, 1963, the appellant Woxberg filed a timely notice of appeal. On April 15, 1963, the appellant Dykes filed a timely notice of appeal. Co-defendants Hester and Barnes elected not to appeal their convictions [C. T. 214, 217].

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[1]C. T. refers to Clerk's Transcript of Proceedings.

The jurisdiction of the United States District Court for the Southern District of California was based upon Section 501(c) of Title 29, United States Code, and Section 3231 of Title 18, United States Code.

The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based upon Sections 1291 and 1294 of Title 28, United States Code.

II.
Statutes Involved.

Section 501(a) of Title 29, United States Code provides as follows:

> "The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and to expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization

or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy."

Section 501(c) of Title 29, United States Code, provides as follows:

"Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both."

III.

Statement of the Case.

A. Questions Presented.

Appellants in their consolidated brief set forth lengthy specifications of error. Reduced to their simplest form the errors asserted lend themselves to classification as follows:

1. Asserted insufficiency of evidence to sustain the verdicts of guilty on Counts One, Two, Nine and Ten.
2. Asserted errors in instructions given and refused.

The questions presented by this appeal are the following:

1. Was there sufficient evidence to support the factual determination that the Severance Fund which was the subject of Count One of the Indictment, was money, funds, securities, property

or assets of Local 224 at the time it was distributed by appellants to themselves and others?

2. Was there sufficient evidence to support the factual determination that the distribution of the Severance Fund by appellants to themselves and others was criminal conduct as charged in Count One of the Indictment and as such prohibited by Section 501(c) of Title 29, United States Code?
3. Was there sufficient evidence to sustain the convictions of appellants as to Count Two of the Indictment?
4. Was there sufficient evidence to sustain the conviction of appellant Woxberg as to Counts Nine and Ten of the Indictment?
5. Was there prejudicial error in the giving or refusing of instructions?

The brief filed by appellants appears primarily directed at their conviction on Count One of the Indictment. In that count appellants and their co-defendants were charged in substance with the unlawful taking of the so-called "Severance Fund" ($35,178) on November 2, 1959. The principal thrusts of appellants' attack on this count appear to be:

1. The Severance Fund was taken with the consent of the union as wages. Therefore there was insufficient evidence of a wrongful taking prohibited by Section 501(c) of Title 29, United States Code.
2. The Severance Fund was wrongfully taken from the union prior to a time when such taking was a federal offense. Therefore there was insufficient evidence of a wrongful taking prohibited by Section 501(c) of Title 29, United States Code.

3. The Severance Fund was wrongfully taken from a trust fund and not the union. Therefore there was insufficient evidence that the Severance Fund was money, funds, securities, property and assets of a labor organization.
4. The Severance Fund was wrongfully taken from the union but it was taken in good faith. Therefore there was insufficient evidence of the requisite intent.

IV.

Statement of Facts.

A. Preliminary Statement.

The scope of review necessary to determine the questions raised by this appeal has been limited by the discriminate verdicts returned by the jury.

The twenty count indictment alleged violations of Section 501(c) of Title 29, United States Code, which can be summarized briefly as follows: (1) Count One involved the taking of the so-called "Severance Fund". Count Two involved the payment by Local 224 of the expenses of winding up and distributing this fund. These counts are involved in this appeal. (2) Counts Three through Eight involved transactions where it was asserted that union funds were expended at a discount house, Atlantic Sales and Service to purchase a washer, freezer, tea kettle and an electric frying pan for the personal use of appellant Woxberg. These counts are not involved in this appeal. (3) Counts Nine and Ten involved the payment of union funds to Frank's Automotive Service for the mechanical reconstruction of appellant Woxberg's jeep. These counts are involved in this appeal. (4) Counts Eleven through Eighteen in-

volved expenditures of union funds in the purchase of mortgage redemption life insurance policies which accrued cash values for the benefit of appellant Dykes and co-defendants Hester and Barnes. These counts are not involved in this appeal. (5) Counts Nineteen and Twenty involved the taking of a union owned Cadillac by the appellant Woxberg and a union owned Buick by appellant Dykes. These counts are not involved in this appeal.

The trial in the court below required approximately six weeks and is reported in over 2,800 pages of transcript. For the purpose of orientation and identification only, the appellee submits the following list of all of the witnesses who testified during the trial and the subject matter of their testimony:

Homer L. Woxberg, appellant. Woxberg was the principal executive officer of Local 224 (1943 through 1961). Served as Secretary-Treasurer of Local 224 and member of Executive Board (1947 through 1961). Signed checks for Local 224. Member of Western States Teamsters Retirement Plan (1949 to 1960). Asserted trustee and member of Severance Fund. Signed checks drawn on Severance Fund bank account (1955 through 1959). Received $9,216.67 in cash and trust deeds from severance fund. Members of Security Fund Partnership.

Woxberg testified in his own defense [R. T. 1188 to 1803].[2]

Wayne Franklin Dykes, appellant. Dykes came to Los Angeles from Denver with Woxberg in 1943. Employed by Woxberg as a Business Agent for Local 224

[2]R. T. refers to Reporter's Transcript.

(1943 through 1962). Served as President of Local 224, member of its Executive Board and sometimes acting Recording Secretary (1947 through 1962). Acted as principal executive officer Local 224 in 1962. Signed checks for Local 224. Member of Western States Teamsters Retirement Plan (1949 through 1962). Asserted trustee, member of Severance Fund and signed checks drawn on the Severance Fund bank account (1955 through 1959). Received $9,216.68 in cash and trust deeds from Severance Fund distribution. Member of Security Fund Partnership.

Dykes testified in his own defense [R. T. 1928 to 2211].

Donald V. Hester, co-defendant. Convicted but not appealing. Employed as a Business Agent for Local 224 (1947 through 1962). Served as trustee of Local 224, member of its Executive Board and sometimes acting recording secretary (1947 through 1962). Signed checks for Local 224. Member of Western States Teamsters Retirement Plan (1954 to date). Asserted trustee, member of Severance Fund and signed checks drawn on the Severance Fund bank account. Received $6,824.57 in cash and trust deeds from Severance Fund distribution. Member of Security Fund Partnership.

Hester testified in his own defense [R. T. 2398 to 2463].

Hobart Anson Barnes, co-defendant. Convicted but not appealing. Employed as a Business Agent for Local 224 (1950 to 1962). Served as trustee of Local 224, member of its Executive Board (1950 through 1962). Member of Western States Teamsters Retirement Plan 1954 to date. Asserted member of Severance Fund.

Received $5,311.91 in cash and trust deeds from Severance Fund distribution. Member of Security Fund Partnership.

Barnes testified in his own defense [R. T. 2219 to 2354 and 2364 to 2391].

Sidney E. Wassen. Employed by Local 224 as an organizer (September 3, 1955). Appointed Secretary-Treasurer 1962 while Dykes assumed duties of Principal Executive Officer. Received $2,356.94 in cash and trust deeds from the Severance Fund distribution.

Testified regarding Severance Fund and missing union financial records [R. T. 341 to 378, 384 to 426, and R. T. 1894 to 1901].

Joseph McBride. Employed as an organizer by Local 224 (November 1, 1955). Received $2,251.40 in cash and trust deeds from Severance Fund distribution.

Testified regarding Severance Fund [R. T. 232 to 340 and R. T. 381 to 384].

George G. McConachie. Appointed then later elected (non writing) Recording Secretary and rank and file member of Executive Board Local 224 (1952 through 1961).

Testified regarding his attendance at Executive Board and general membership meetings [R. T. 2543 to 2558].

Clarence M. Layman. Twice appointed rank and file trustee of Local 224 by Executive Board (1955 to 1957 and 1958 to 1962).

Testified regarding his attendance at Executive and general membership meetings [R. T. 208 to 520 and 525 to 585].

Charles M. French. Appointed rank and file trustee by Executive Board (1960-1962).

Testified regarding his attendance at Executive Board and general membership meetings [R. T. 3532 to 3543].

Clyde W. Yandell. Secretary-Treasurer and principal executive officer of Local 224.

Custodian of records kept by Local 224 in the regular course of business. Testified regarding his attendance at general membership meetings [R. T. 427 to 503 and R. T. 1337 to 1347].

Keith Ottesen. Elected to Executive Board Local 224 in 1962.

Testified regarding his attendance at Executive Board and general membership meetings [R. T. 585 to 626 and R. T. 2671 to 2674].

Dorothy N. Johnson. Office manager Local 224 (1957 to date). Secretary and kept accounting records for local.

Testified regarding records and office procedures [R. T. 859 to 1089 and R. T. 2590 to 2599].

Maxine Butler. Clerk employed in Local 224's office (1949 to date of trial).

Testified regarding office and procedures [R. T. 504 to 507].

Joe Ivan Carl, rank and file member of Local 224.

Testified regarding general membership meetings. Also took notes at the meetings [R. T. 691 to 778 and 1347 to 1354].

Fred Connelly, rank and file member of Local 224.

Testified regarding general membership meetings [R. T. 2578 to 2589].

William Logan, rank and file member of Local 224.

Testified regarding general membership meetings [R. T. 627 to 657 and R. T. 662 to 691].

William Lukrafka, rank and file member of Local 224.

Testified regarding general membership meetings [R. T. 2563 to 2569].

E. C. Ellyson, rank and file member of Local 224.

Testimony regarding his attendance at general membership meetings read into records [R. T. 2656 to 2663].

Norman F. Nordin. Assistant to the auditor and custodian of business records of Occidental Life Insurance Co.

Testified regarding Local 224's group insurance policy and the Experience Rating Refunds made to the local [R. T. 7 to 40].

Ira L. Browning. Custodian of business records of Occidental Life Insurance Co.

Testified regarding the Western States Teamsters Retirement Plan covering union officers and business agents [R. T. 671 to 691].

Richard A. Perkins. Attorney and neighbor of appellant Woxberg.

Testified regarding his legal services in connection with the Severance Fund [R. T. 1803 to 1888 and 1902 to 1927].

Laurence McBride. Real estate broker and mortgage loan broker.

Testified regarding his services in connection with the Severance Fund [R. T. 97 to 227].

Grant C. Earl. Special Agent, Federal Bureau of Investigation.

Testified regarding his schedules and summaries prepared for the trial [R. T. 1090 to 1121].

Frank Whipple, proprietor of Frank's Automotive Service.

Testified regarding his services in reconstructing appellant Woxberg's jeep [R. T. 780 to 790 and R. T. 796 to 810].

John C. Curtis, Insurance man [R. T. 2464 to 2531].

Raymond T. Rodriguez, Insurance man [R. T. 41 to 82].

Lenore Humphrey, secretary (to Al Burney who died during the trial) at Atlantic Sales and Service.

Testified about business records at Atlantic Sales and Service [R. T. 810 to 858 and R. T. 2667 to 2671].

J. V. Hicks. Accountant. Testified regarding Atlantic Sales and Service [R. T. 2599 to 2655].

Joseph R. Zazueta, Certified Public Accountant retained by Atlantic Sales and Service [R. T. 2665 to 2671].

Carlos M. Teran. Friend of appellant Woxberg and Al Burney of Atlantic Sales and Service [R. T. 2355 to 2364].

B. Counts One and Two.

Linedrivers Local 224 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 402(i) of Title 29, United States

Code [R. T. 531]. The local came into existence in 1943 and after completing a successful trusteeship was chartered in 1947 [R. T. 1190].

The general membership of Linedrivers Local 224, which included some 2500 to 2600 men, met regularly on the 4th Sunday of each month except during the summer months of June, July and August. [R. T. 1549]. The general membership meetings were held in the union hall which could accommodate approximately 200 [R. T. 396, 1549]. Most meetings were attended by only 50 to 100 members [R. T. 287, 1543 and 1546]. Monthly dues of $8.00 were paid by each member [R. T. 390].

Local 224 was governed by an Executive Board which met in the morning at the office of the local on the 4th Sunday of each month, just prior to the general membership meetings [R. T. 865]. Beginning in October of 1959 after the effective date of the Landrum Griffin Act, the Executive Board met specially on the first Monday of each month for the purpose of approving the miscellaneous and regular bills to be paid by the local [R. T. 865]. The rank and file members of the Executive Board were normally unable to attend this meeting [R. T. 865].

Appellants Woxberg and Dykes had been paid employees of the Teamster Union in Denver prior to coming to Los Angeles in 1943. The International Union's trustee employed Woxberg to serve as keeper of the new local. Dykes was hired as Business Agent [R. T. 2058, 2061].

Beginning in November 1947 and continuing to the date of trial Line Drivers Local 224 was governed by the following rules which were adopted at the gen-

eral membership meeting held on November 23, 1947; [Ex. 43 R. T. 1205-1206].

"(1) Election of officers shall be conducted as provided in the International Constitution, and shall be elected for the following terms of office: President, 1 year; Vice-President, 1 year; Recording Secretary, 1 year; Secretary-Treasurer, 5 years; One Trustee, 1 year; One Trustee, 2 years; One Trustee, 3 years.

(2) The administration, supervision and direction of the affairs of Local No. 224 shall be vested in the Secretary-Treasurer and the President, subject to the approval of the Executive Board.

(3) All employees of Local No. 224 shall be employed and directed by the Secretary-Treasurer and President.

(4) Salary and expenses of all employees shall be set and approved by the Secretary-Treasurer and the President, subject to the approval of the Executive Board. No action shall be taken by the Executive Board or the membership meeting of Local No. 224 that in any way effects policy or expenditures of money in the absence of the Secretary-Treasurer and President.

(5) The office of Secretary-Treasurer shall be the only elective paid position of the Executive Board of the local union.

(6) In the case of a vacancy in the Executive Board of the Local, such vacancy shall be filled by the majority action of the Executive Board for the unexpired term.

(7) The Executive Board shall be empowered by the local union to conduct all the business of the local between regular meetings.

(8) It will take two-thirds (⅔) majority vote of entire membership to change the above rules."

The first election of officers resulted in Woxberg being named Secretary-Treasurer of the local and Dykes being elected President [R. T. 1193-1194 Ex. 43].

In 1949 the Western States Teamster Retirement Plan was established and during that year Woxberg and Dykes became members [R. T. 675-680]. Paid union officers and business agents were eligible to join this plan. The plan was supported by the officer's or agent's employee contributions and by a per capita tax on the membership of the officer's or agent's local and it provided $300 a month at age 65, $10,000 life insurance and a cash benefit for the individual paid officer. When terminating his participation as one covered in the plan, an officer or agent could, in substance, take the entire cash benefit created to the date of termination or take some cash plus a lesser annuity [R. T. 681]. When Woxberg terminated his participation in the plan on January 31, 1960, he received $4,135 in cash and a paid up annuity which will pay him $117.62 a month beginning in 1978 when he attains the age of 65 years [R. T. 679-680]. It should be noted that in addition to the per capita tax on the membership, Local 224 also paid all of the employee contributions to the plan through October of 1959 [R. T. 911, 1622-1625 Ex. 73].

Soon after the local was chartered Donald V. Hester and Hobart Anson Barnes became members of the Ex-

ecutive Board of Local 224. They were employed by Woxberg and Dykes as business agents for the local [R. T. 92-95 Ex. F], and on January 1, 1954 became members of the Western States Teamsters Retirement Plan [R. T. 679-680].

The following month, according to the February 28, 1954 minutes of the general membership meeting of Local 224, Woxberg made the following report:

> "He [Woxberg] explained in detail the Pension Plan proposed for the officers and office manager of the Local Union, and pointed out that those involved were requesting such a Plan in lieu of any wage increases for the next ten years. That those involved would not request a wage increase if conditions and the cost of living remained at the present level, but would not waive their rights for an increase if we went into an inflationary period. It was explained that this money would be placed in Trust in lieu of wage increases so that those involved could take advantage of the present income tax laws. It was pointed out further that those who would come under the Plan would request its abolishment if it could not be carried under our present dues structure."

Woxberg's suggestion was tabled until the next meeting when it was rejected [R. T. 1248, 1249 and Ex. 44].

Some months later Woxberg approached his neighbor Richard E. Perkins, an attorney at law, and retained him to draft an agreement [R. T. 1812-1814 and 1318-1319]. At this time and continuing through to the date of trial Local 224 paid a monthly retainer to a law firm located across the street from the local's

office. This retainer was paid based upon a per capita tax on the membership.[3] Perkins knew nothing about Local 224, but Woxberg explained what he wanted. After several drafts and several months the agreement was completed and delivered to Woxberg.

On April 4, 1955 Woxberg returned the agreement to Perkins because the name was incorrect [R. T. 1813]. Thereafter the corrections were made and the final draft was delivered to Woxberg.

The agreement was entitled *"Agreement and Declaration of Trust Severance Fund Line Drivers Local 224"* [Ex. E]. The document provided in part as follows:

> "1. *Purpose of Trust:*
>
> "(a) The membership of Line Drivers Local No. 224, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, hereinafter referred to as 'Local 224', an unincorporated association, has by resolution duly adopted, voted to make contributions to a severance fund to provide a measure of security for certain paid officers and employees of Local 224 and provide benefits for them similar to some of the benefits available to employees of numerous private employers under pension, retirement, profit-sharing, and stock bonus plans;
>
> "(b) Local 224 has directed that insurance refunds payable to it from time to time shall be contributed for the aforesaid purpose, together with

[3]The firm of attorneys retained by Local 224 were never consulted regarding the establishment, administration and dissolution of the Severance Fund. In fact the regular Local 224 attorneys remained in complete ignorance of the fact that a Severance Fund existed or was contemplated. [R. T. 1495, 1496].

such other monies as may be designated for that purpose in future; and . . .

"11. *Covered Employment:* As used herein for purposes of identifying the beneficiaries hereunder and determining eligibility to receive benefits (subject to the provisions hereof) the term 'covered employment' means employment after the qualifying period in one of the following paid offices and positions with Local 224: Secretary-Treasurer, Business Agent, and Office Manager. The term 'covered employee' means an individual in covered employment. At the date of this agreement the qualifying period shall be three years of continuous service in such paid office or position with Local 224 prior to the date of this agreement. As to any person who qualifies after the date of this agreement, the qualifying period shall be at least three years of continuous service in such paid office or position with Local 224 prior to the first day of April of 1956 or any subsequent year. In any case, qualification shall be attained upon, and the right to benefits shall be reckoned from, the first day of April after the expiration of the qualifying period.

* * * * *

"15. *Eligibility-Forfeiture:* Notwithstanding any other provision of this agreement and declaration of trust, no beneficiary shall be entitled to receive distribution hereunder unless at his separation date (or the separation date of the deceased covered employee under whom he claims) he (or the deceased covered employee, as the case may be) (1) shall have previously accepted this agreement and declaration of trust in writing, and (2) is a mem-

ber in good standing of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, hereinafter called the Union. A separated employee shall be deemed to be a member of the Union in good standing although he may be in arrears in the payment of dues and assessments to the Union, but no person shall be deemed to be a member of the Union in good standing if at his separation date he has been expelled from the Union after a trial on charges preferred against him in accordance with the Union constitution. If at the separation date of a covered employee either of the conditions numbered (1) and (2) above is not met, then the separated employee (and any beneficiary claiming under him, in the event of his death) shall forfeit his right to receive distribution hereunder."[4]

It should be noted that on March 1, 1955, Occidental Life Insurance Company of California, Local 224's insurance carrier for the group insurance program issued Line Drivers Local 224 its check [Ex. 29] in the amount of $8,143.43 as its annual "Experience Rating Refund" for the year ending December 31, 1954 [R. T. 22].

On March 28, 1955, Woxberg, Dykes and the local's office manager, Miss Gladys Rang, opened a bank

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[4]Paragraph 15 of the Agreement was later the subject of a tax ruling by the Commissioner of Internal Revenue [Ex. P]. The request for the ruling was made with the cooperation of attorney Richard E. Perkins on behalf of the Severance Fund. The ruling provided in partinent part:

"Since Paragraph 15 of the trust provides that expulsion from the Teamsters International Union will cause a participant to forfeit all his rights to benefits under the trust, a contingency does exist. Therefore, Miss Rang's interest in the employer contributions was forfeitable when the contributions were made, and they were not includible in her gross income in the years contributed."

checking account in the name "Severance Fund, Line Drivers Local 224". Each signed the signature card [Ex. 1]. The $8,143.43 check was endorsed and used as the opening deposit [Ex. 1]. The Experience Rating Refunds for the years ending December 31, 1955, December 31, 1956 and December 31, 1957 were each in turn endorsed and deposited to this Severance Fund bank account [Exs. 30, 31 and 32].

For the sake of completeness it should be noted that the minutes for the Executive Board meetings and the general membership meetings during the period show the following: (a) March 27, 1955, Executive Board minutes signed by the appellant Dykes as Acting Recording Secretary:

> "After some discussion involving pensions and severance pay for the officers and office manager, a motion was made and seconded to concur in the request of the Secretary authorizing him to have an attorney draft a trust agreement covering severance pay for the paid officers and office manager, and deposit the insurance refund in the severance trust. Motion Carried" [Ex. 44].

(b) The April 3, 1955 Executive Board minutes signed by (co-defendant) Hester as Acting Recording Secretary:

> "The Secretary read the Severance Fund trust agreement. A motion was made and seconded that the Severance Trust agreement be approved effective April 1st" [Ex. 44].

On April 3, 1955, the general membership voted to go on strike at a special meeting [Ex. 44]. The strike occurred soon thereafter throughout the Western Con-

ference and lasted several months [R. T. 291]. Through the lengthy strike the rank and file teamsters won a pension plan [R. T. 291, 1245, 1246 to 2086].

In February of 1958 the group insurance for the local was withdrawn from Occidental Insurance Co., and was placed with Girardian Insurance Co., represented locally by a long time associate of Woxberg's [R. T. 1626]. The minutes of the general membership meeting of Local 224 on February 23, 1958 reveal that in discussing the cost of the group insurance the membership was unaware that Experience Rating Refunds were being received annually.

Occidental Insurance Company's effective group insurance premium at the time of this change, was 84 cents per member per month, less the amount of the annual Experience Rating Refund. Girardian Insurance Company's rate was a flat 50 cents per man per month without any Experience Refund [R. T. 1626-1632].

The February 23, 1958 minutes provide as follows:

> "In the discussion of changing insurance companies, a motion was made and seconded to change insurance companies and also to check into increasing the death benefit with the balance of the 34 cents without increasing the dues" [Ex. 44].

Beginning in March 1958, the month following the change in companies for the Local 224 group insurance and concurrent termination of the annual Experience Rating Refund payments, and continuing through October 1959 Dykes, Hester and Barnes each received a $500 Government Bond purchased by Local 224, however, the minutes of Local 224 are silent as to these benefits [R. T. 2497 and Ex. 43, 44 and 73].

During the summer of 1959 it appeared to Woxberg and Dykes that Congress was about to enact some labor legislation. Many discussions were had with union attorneys about the impact of the pending acts upon the operation of a union local [R. T. 1495-1499, 1638, 1639, 2109].

In the fall of 1959 Woxberg again went to his friend, attorney Richard E. Perkins and asked him to draft a document which would cover the distribution of the Severance Fund [R. T. 1878, 1879, 1659, 1660]. Woxberg was advised by Perkins to get the approval of the membership to such a distribution [R. T. 1643, 1847, 1848 and 1849]. This advice was not followed unbeknownst to Perkins [Ex. 44, R. T. 1908, 1911 and 1643]. A document entitled "Agreement for Termination of Trust and Distribution of Assets [Ex. G] was drafted and delivered to Woxberg by Perkins [R. T. 1878]. This document provided in part as follows:

> "2. The net assets of the trust, after paying any trust expenses, including attorney fees and any other expenses of winding up, shall be distributed by the trustees to the present beneficiaries of said trust or their nominees. Each beneficiary (or his nominee) shall receive a sum which represents that proportion of the net assets of the trust which the months of service of such beneficiary bears to the total number of months of service of all beneficiaries. 'Months of service' as used herein shall have the same meaning as in said agreement and declaration of trust, particularly sections 11, 14, and 16 thereof."

Perkins submitted his bill for services to Woxberg and was paid thereafter with a check drawn on Local 224's bank account [R. T. 1885, 1886, Exs. 100, 44].

Soon after the Severance Fund bank account was established the funds deposited therein were used to purchase second trust deeds [Exs. 1, 76]. In 1957 Larry McBride, of McBride Investments, a mortgage loan broker, who had been selling trust deeds to Woxberg during the preceding year was engaged by Woxberg to buy, service and manage investments purchased with Severance Fund bank account money [R. T. 114].

In September of 1959 Woxberg instructed McBride that he should trasfer the entire bank account and investment portfolio to Woxberg, Dykes, Hester, Barnes, Wasson and McBride consistent with the "Agreement for Termination of Trust and Distribution of Assets" [Exs. G, 1, 77 and 78].

On November 2, 1959 the distribution of the Severance Fund was made [Ex. 77]. Woxberg received $9,216.69; Dykes received $9,216.68; Hester received $6,824.57; Barnes received $5,211.91; Sidney Wassen and Joseph McBride received $2,356.94 and $2,251.40 respectively even though they were organizers [R. T. 234, 343], and not business agents, therefore not "covered employees" under the so-called Severance Fund [Ex. E]. The Severance Fund minutes indicate that Wasson and McBride were members of the Severance Fund on April 27, 1957 less than two years after they were employed [Ex. F]. The total distribution was $35,178.19 in cash and trust deeds [Ex. 77].

Woxberg, Dykes, Hester and Barnes formed a partnership to receive their shares of the distribution [Ex. 58, R. T. 150].

Larry McBride handled the transfer of the 22 trust deeds in the portfolio. He paid the $2.00 per trust deed recording cost and drafted the necessary transfer

documents. He billed the Severance Fund $220 through Woxberg for his services in connection with the winding up and distribution of the Severance Fund [R. T. 169 to 171, Ex. 2]. During the year in which he managed the Severance Fund investments McBride came to personally know Woxberg, Dykes, Hester and Barnes [R. T. 109].

Dorothy Johnson[5] the office manager of Local 224 was instructed by Woxberg to list for Executive Board approval on December 1, 1959, under the heading Miscellaneous Bills[6] the item "Larry McBride—Arbitration Audit—$220" [Ex. 2, R. T. 890 and 993]. On December 2, 1959, the item having been approved by Woxberg, Dykes, Hester and Barnes sitting as the Executive Board for Local 224, a check in the amount of $220 was drawn on the local's bank account signed by Woxberg and Dykes and made payable to Larry McBride. The descriptive charge noted on the check was "Arbitration Audit 220.00" [Ex. 2].

Larry McBride has never performed any services directly for Local 224, has never performed any audits for Local 224 and has never performed any arbitration for Local 224 or any other union [R. T. 172, 175 and 179].

Attorney Richard Perkins' legal fees for the termination agreement were similarly approved at the same

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[5]Dorothy Johnson succeeded Gladys Rang as Office Manager when Miss Rang died on April 13, 1957 [R. T. 506].

[6]Prior to the Landrum Griffin Act the Executive Board met once each month. After October of 1959 a special meeting of the board was held during the week and was attended normally only by Woxberg, Dykes, Hester and Barnes. The purpose of this special meeting was for the approval of bills. The bills would be classified and listed either as "Miscellaneous" or "Regular" [R. T. 865, 866].

meeting of the Executive Board and were paid from Local 224 funds and not from the Severance Fund as the termination agreement specified [Ex. 100, R. T. 1184].

During the entire period in which the Severance Fund was in existence no mention was made to the rank and file members of Local 224 [R. T. 237, 346, 347, 348, 512, 589, 633, 693, 697, 698, 2543, 2557, Exs. 40, 43, 44 and 45], or to the rank and file members of the Executive Board [R. T. 238, 348, 515 and 550] and no mention was ever made of the fact that Occidental Insurance Company made annual "Experience Rating Refunds" [R. T. 2558].

On February 20, 1959, the check for the Experience Rating Refund for the year ending December 31, 1958 was issued by Occidental Insurance Company. This check was in the amount of $287.68[7] [Ex. 33]. Dorothy Johnson, the office manager, first saw this check when she opened the mail and did not know what it was for. She checked with Woxberg, who told her to post it on the machine. The check was posted, deposited in the local's bank account and noted in the local's books [R. T. 922, 923, Ex. 74]. No request was ever made by Woxberg, Dykes, Hester or Barnes for this money [Ex. 1 and R. T. 1637].

The September 27, 1959, minutes of the general membership meeting are silent as to any mention of the Severance Fund. The following excerpts from the minutes of the Executive Board meeting and the minutes of the general membership meeting on September 27, 1959, demonstrate the difference between the purported discussions at each meeting [Ex. 44].

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[7]This check was based upon the rating experience during 1958 prior to the change in group insurance carriers by the local.

Executive Board minutes, September 27, 1959:

> "Motion was made and seconded that the Secretary-Treasurer *and Trustees of Severance Fund* be authorized in conjunction with the attorneys to discontinue *the Severance Fund and* payment to the Pension Fund and car allowance to said employees and distribute these monies to the employees as salary; thereby placing the responsibility of reporting to the Government on the employee involved" (emphasis added).

General Membership minutes, September 27, 1959:

> "Motion was made and seconded that the Secretary-Treasurer be authorized in conjunction with the attorneys to discontinue payment to the Pension Plan and car allowance to paid employees and distribute these monies to the employees as salary; thereby placing the responsibility of reporting to the Government on the employee involved."

The emphasis was added to the Executive Board minutes above to highlight the omissions of the words emphasized from the minutes of the general membership meeting.

During 1959 Woxberg, Dykes, Hester and Barnes each received several pay raises [R. T. 912, 913 and Ex. 73].

In March of 1962 a Grand Jury subpoena was served upon the local for its financial records. Immediately thereafter the records were found to be missing [R. T. 363, 390, 391, 895 and 896 and Ex. 103]. Several telephone calls were made from the local's office to appellant Woxberg in Las Vegas during this period [R. T. 1706, 1707, Ex. 103].

C. Counts Nine and Ten.

Late in 1960 Woxberg purchased a jeep in Las Vegas [R. T. 2005]. Dykes was requested to tow the jeep to the Los Angeles area for extensive repairs [R. T. 2005, 2006]. Dykes took the jeep to Frank's Automotive Service operated by Frank Whipple [R. T. 2007, 2008]. An examination of the vehicle revealed that the cost of the mechanical reconstruction necessary could be reduced by the purchase of surplus jeep parts [R. T. 2008].

On April 4, 1961, Dykes secured a check from the union in the amount of $355.00 payable to Frank's Automotive Service. The notation "Repairs H.L. Woxberg $355.00" was noted upon the check [Ex. 9] and in the schedule of bills approved by the Executive Board on the same date [Ex. 43, R. T. 883, 884]. It should be noted that Woxberg drove a union owned Cadillac during this period and all repairs and maintenance in addition to fuel and tires on this Cadillac were regularly purchased by the union [R. T. 928, 929 and Ex. 42]. Dykes drove a union owned Buick which was similarly treated [R. T. 928, 929 and 2114 and Ex. 42].

On April 7, 1961 Dykes met Frank Whipple at Coast Truck Parks where a used transmission, rear end, windshield and other parts were purchased by Whipple with his check [Ex. 70] in the amount of $275.00 [R. T. 789, Ex. 24].

The jeep was fixed and delivered to Dykes on April 15, 1961. Whipple billed "Avis M. Dykes" [Ex. 24], appellant Dykes' wife, for the $460.86 in parts and labor expended. He assumed the jeep belonged to Dykes [R. T. 799].

On April 21, 1961, Woxberg had a second check drawn on the Local 224 bank account [Ex. 10] payable to Frank's Automotive Service in the amount of $105.-86. Again the caption "Repairs H.L. Woxberg $105.-86" appeared in the upper left hand corner of the check. On April 24, 1961, Woxberg forwarded this check to Frank's Automotive Service "Attention Mr. Whipple" with a transmittal letter which he had dictated to Dorothy Johnson reviewing the transaction [Ex. 25]. Woxberg's letter stated as follows:

"Frank's Automotive Service
42 W. Live Oak Avenue
Arcadia, California

ATTENTION: Mr. Frank Whipple

Dear Mr. Whipple:

Enclosed you will find check #11607 in the amount of $105.86 which is the difference owing you on the repair work on the jeep per your invoice #8298.

You have received to date a check for $355.00 and the enclosed check makes up the difference for the total due of $460.86.

Very truly yours,

H. L. Woxberg
1616 West 9th Street, Rm. 322
Los Angeles 15, California

HLW:dj

Enclosure (ck—$105.86)"

The $105.86 was included with the "regular bill" for Executive Board approval on May 5, 1961 [R. T. 889 and Ex. 43].

Dykes concealed a subsequent payment for repairs to the jeep at Frank's Automotive Service by charging the cost of the repairs on his gasoline credit card through his neighborhood gas station [R. T. 2113 to 2124, 2207, 2208 and Exs. 71, AG-1, 42 and 104].

When Woxberg received his jeep he had it reupholstered and had a new top made. He also had it painted. When completed the jeep was taken to Woxberg's hunting cabin at Mammoth Mountain [R. T. 360, 361, 1539 to 1541].

The union also paid for Woxberg's auto insurance on the jeep [Exs. 91, 92, 95 and 96 and Ex. 42, R. T. 1713 to 1715].

In 1962, after the criminal investigation had uncovered the Frank's Automotive Service transaction, Dykes contacted Woxberg, who then repaid the union the full amount [R. T. 2020, 2021].

V.

Summary of Argument.

A. There was sufficient evidence to support the factual determination that the Severance Fund which was the subject of Count One of the Indictment, was money, funds, securities, property or assets of Local 224 at the time it was distributed by appellants to themselves and others.

B. There was sufficient evidence to support the factual determination that the distribution of the Severance Fund by appellants to themselves and others was criminal conduct as charged in Count One of the Indictment and as such prohibited by Section 501(c) of Title 29, United States Code.

C. There was sufficient evidence to sustain the convictions of appellants as to Count Two of the Indictment.

D. There was sufficient evidence to sustain the conviction of appellant Woxberg as to Counts Nine and Ten of the Indictment.

E. There was no prejudicial error in the giving or refusing of instructions.

VI.

Argument.

A. There Was Sufficient Evidence to Support the Factual Determination That the Severance Fund, Which Was the Subject of Count One of the Indictment, Was Money, Funds, Securities, Property or Assets of Local 224 at the Time It Was Distributed by Appellants to Themselves and Others.

Appellant does not contest the fact that the so-called Severance Fund was created and financed exclusively by the Experience Rating Refund checks [Exs. 29 to 32] issued to Line Drivers Local No. 224 by Occidental Life Insurance Co. of California [Exs. 1, 76].

Accordingly the Severance Fund was the asset and property of Line Drivers Local No. 224 on November 2, 1959, unless prior to that date the local transferred its interest in those funds to another.

Appellants asserted at trial that Local 224 transferred all of its right, title and interest in the Experience Rating Refunds, prior to September 14, 1959, the effective date of the Labor Management Reporting and Disclosure Act of 1959, pursuant to an Agreement and Declaration of Trust. This Agreement and Declaration of Trust was purportedly executed on April 3, 1955, effective April 1, 1955 by appellants and their convicted but non-appealing co-defendants and was entitled "Agreement and Declaration of Trust Severance Fund Line Drivers Local 224" [Ex. E].

This document recited that:

"1. Purpose of Trust:

(a) The membership of Line Drivers Local No. 224 . . . has by resolution duly adopted voted to make contributions to a severance fund . . .;

(b) Local 224 has directed that insurance refunds payable to it from time to time shall be contributed for the aforesaid purpose, . . ."

In support of this recital appellants urged that the minutes of the local's Executive Board meeting for March 27, 1955 and April 3, 1955, recorded by appellant Dykes and co-defendant Hester were authentic. These minutes provided in pertinent part as follows [Ex. 44]:

March 27, 1955

"After some discussion involving pensions and severance pay for the officers and office manager, a motion was made and seconded to concur in the request of the Secretary authorizing him to have an attorney draft a trust agreement covering severance pay for the paid officers and office manager, and deposit the insurance refunds in the severance trust. Motion Carried."

April 3, 1955

"The Secretary read the Severance Fund trust agreement. A motion was made and seconded that the Severance Trust agreement be approved effective April 1st."

Appellants and their co-defendants testified that these minutes were read and approved by the general membership at the March 27, 1955 and April 24, 1955 general membership meetings. These minutes were recorded by appellant Dykes [Ex. 44].

Evidence which contradicted the testimony of the appellants and recitals contained in the minutes and the Declaration of Trust was introduced by the prosecution.

In view of this conflict in the evidence, the trial court during its charge to the jury stated as follows:

"Now, I want to go back and discuss with you for just a moment or two the indictment. Count 1 concerns the severance fund and a large part of the testimony in this case concerns count 1, the severance fund. I told you, I think I told you, I may not. You know that memory is tricky and I don't know whether I told you or not. I told the lawyers, but I think I told the lawyers in your presence, that one of the issues here to be determined by you is who owned the severance fund. Was the severance fund owned by the union or was it owned by the severance fund itself, by the trust? There is no dispute in this case that the money that went into the severance fund belonged to the union. It was union refunds. We have in evidence the checks and I have the checks before me, and the checks are made payable to Line Drivers Local 224. So when these checks were issued and delivered, they belonged to the union.

"They were deposited in the fund account. Did that deposit in the fund account mean that the money was transferred over to the fund, or did it belong to the union?

"Now, in determining this question, you can go back to Exhibit E, which is the agreement and declaration of trust, and you may determine now from this agreement that there was a transfer of these funds from the union to the trust. The agreement says:

" 'The membership by resolution duly adopted voted to make certain contributions to a severance

fund to provide a measure of security to certain officers or paid employees.'

"And then Local 224 has directed that insurance refunds payable to it from time to time shall be contributed for the aforesaid purpose, together with such other moneys as may be designated for that purpose in the future.

"Now, here is a question of fact. Here is the agreement. It is for you to determine in your own mind whether or not these funds were transferred to the severance fund. If they were, then you will have to find the defendants not guilty on count 1, because the charge is that they stole and converted the money from the union and, of course, if the union didn't have the money, then they can't be guilty of stealing and converting the money.

"So in considering count 1, you are going to have to determine whether or not this money belonged to the union or belonged to the severance fund." [R. T. 2778, line 8 to 2779, line 25].

As stated by this court in *Mosco v. United States,* 301 F. 2d 180 (9th Cir. 1962), at page 181:

> "The jury, by its verdict, resolved all factual doubts in favor of the government. And this court must view the evidence in the light most favorable to support the judgment."

The evidence supporting this factual determination, stated briefly to avoid undue repetition of appellee's Statement of Fact would include the following:

1. The general membership had emphatically refused and manifested great hostility to appellants request for a pension plan in lieu of wage increases only

a year earlier in February and March of 1954 [Ex. 44, R. T. 633].

2. On April 3, 1955, the date the Executive Board, consisting of appellants and their co-defendants, purportedly approved the Severance Fund the general membership at a special meeting was engaging in a strike vote [Ex. 44].

3. On April 24, 1955 the date on which the general membership purportedly approved the Severance Fund the rank and file members were girding for a long and expensive strike [R. T. 291].

4. The appellants and their co-defendants were members of the Western States Teamsters Retirement Plan [R. T. 675-680]. In 1954 the general membership was already paying a per capita tax so that their officers could enjoy the substantial benefits of this plan. In addition to this tax the local was also paying the employee's contribution [R. T. 911, 1624].

5. Although the local through a monthly per capita tax retained a firm of attorneys the appellants concealed the creation and existence of the Severance Fund from them and employed the legal services of Woxberg's neighbor for the drafting of the Severance Fund document. Although the March 27, 1955 Executive Board minutes purport to authorize Woxberg to retain an attorney to draft a trust agreement Perkins had been already working for several months [R. T. 1495, 1496, 1318, 1319, 1812, 1813, 1814 and Ex. 44].

6. The Executive Board minutes of April 3, 1955 recite purported approval effective April 1, 1955 yet the final draft was not delivered until some time later [Exs. 44, 101 and R. T. 1813].

7. Perkins advised appellants to secure approval of the Severance Fund yet not only the creation of the Severance Fund was concealed but even its existence and later distribution was concealed not only from the retained attorneys but from the rank and file members of the Executive Board and the general membership as well [R. T. 1878, 1879, 1659, 1660, 237, 346, 347, 348, 512, 589, 633, 693, 697, 698, 2543, 2557, 238, 348, 515, 550]. Even the Experience Rating Refunds were concealed from the rank and file's representative on the Executive Board [R. T. 1626].

8. The initial deposit in the Severance Fund bank account was a check issued March 1, 1955 but which was held for almost a month until March 28, 1955 before cashing.

Additional evidence of other acts of concealment directed towards the day the fund would be appropriated for the use of the appellants and others will in the interest of brevity be discussed later under the question of intent.

In view of this factual determination, supported by the evidence, that Line Drivers Local No. 224 did not transfer the Experience Rating Refunds to a trust, it is clear that ownership of the funds and income derived therefrom was and remained the money, funds, securities, property and assets of Local 224. This conclusion is consistent with the law of the State of California:

The *California Civil Code,* Sections 2233 and 2224 provide:

> "§2223. Involuntary trustee: thing wrongfully detained.

"*Involuntary trustee, who is.* One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner."

"§2224. Involuntary trustee; thing gained by fraud, wrongful act, etc.

"*Involuntary trust resulting from negligence, etc.* One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

This conclusion is consistent with the law of this Circuit as stated in *Brown v. New York Life Insurance Co., et al.,* 152 F. 2d 246, 250 (9th Cir. 1945):

"Appellant paid nothing for the insurance policies and as to her they were a gratituity. She is innocent of fraud perpetrated by herself, but as the lower court pointed out, even the widow of a trustee ex maleficio who has paid no consideration for the property purchased with misappropriated funds, or for their fruits, may not hold such property, or the fruits thereof, against the cestui que trust, who is the real owner. A third person, unless he or she has in good faith acquired for value without notice a subsequent interest, seeking any benefit resulting from the misappropriation, becomes a particeps criminis however innocent of the fraud in the beginning."

See also *Commissioner v. Wilcox,* 327 U. S. 405 (1946) and *James v. United States,* 366 U. S. 213 (1961) overruling *Wilcox* on other grounds.

B. There Was Sufficient Evidence to Support the Factual Determination That the Distribution of the Severance Fund by Appellants to Themselves and Others Was Criminal Conduct as Charged in Count One of the Indictment and as Such Prohibited by Section 501(c) of Title 29, United States Code.

It was necessary for the Government to prove beyond a reasonable doubt that appellants intended to and did embezzle, steal, or unlawfully and wilfully abstract or convert to their own use or the use of others, moneys, funds, securities, assets and property of Local 224 in order to convict the appellants.

Taylor v. United States, 320 F. 2d 843 (9th Cir. 1963).

The jury was instructed pursuant to defendants' requested jury instructions as follows:

"Four essential elements are required to be proved in order to establish the offense of embezzlement as charged in the indictment:

"First, that the person charged was an officer of a labor organization or was employed, directly or indirectly, by a labor organization;

"Second, that the moneys, funds, securities or other assets alleged to have been embezzled belonged to or were owned by a labor organization;

"Third, that said moneys, funds, securities or other assets were lawfully in the possession of or under the control of the person or persons who allegedly embezzled said property at the time of the alleged embezzlement;

"Fourth, that such person or persons fraudulently appropriated said properties to his or their own

use or purpose or to a use and purpose not in the due and lawful execution of his or their trust." [R. T. 2767].

In addition the jury was instructed:

"Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property or other assets of a labor organization of which he is an officer or by which he is employed, directly or indirectly, shall be guilty of an offense.

"The term embezzle as used in this statute means the unlawful taking or conversion by a person to his own use or the use of another of moneys, funds, securities, property or other assets which come into his custody or possession lawfully by virtue of his office or employment. So to constitute embezzlement of the moneys, funds, securities, property or other assets of a labor organization by an officer or employee within the statute, it must appear from the evidence beyond a reasonable doubt that the money, funds, securities, property or other assets came lawfully into the possession of the employee and were, while so held by him unlawfully applied or converted to his own use or the use of another.

* * * * *

"The term 'steals' as used in the statute means any unlawful taking with intent to deprive the owner of the rights and benefits of ownership.

"You are instructed that any person who embezzles, steals or unlawfully and willfully abstracts

> or converts to his own use or the use of another any of the moneys, funds, securities, property or other assets of a labor organization of which he is an officer or by which he is employed, directly or indirectly, is guilty of a crime." [R. T. 2766, 2767, 2768].

As stated before in this brief the jury by its verdict resolved all factual doubts in favor of the Government and this court must view the evidence in the light most favorable to support the judgment.

Mosco v. United States, supra.

First, there was no question that appellants were officers and employees of a labor organization. It was stipulated at trial that both Woxberg and Dykes were officers and members of the Executive Board of Local 224 during all relevant times. It was stipulated between the parties in the trial court that Local 224 was a labor organization within the meaning of Section 402(i) of Title 29, United States Code [R. T. 531].

Second, the Severance Fund was money, funds, securities, property and assets of Local 224 as discussed in our previous argument.

Third, appellants did not question in the court below nor do they question here the uncontraverted facts that the appellants as principal officers of Local 224, being Secretary-Treasurer and President, respectively, had the power and authorization to sign checks drawn on the local's bank account. They shared this power only with their co-defendant Hester. The Experience Rating Refund checks issued by Occidental Life Insurance Company of California were properly delivered to the custody of appellants. It should be noted that only appel-

lants Woxberg and Dykes and their co-defendant Hester had the power to draw checks on the Severance Fund bank account. Accordingly the control of the Experience Rating Refunds and the fruits derived therefrom remained with appellants and Hester up to and including the date of the distribution of the Severance Fund.[8] The Severance Fund bank account was at all times maintained in the name of "Severance Fund Line Drivers Local 224".

Fourth, that appellants and their co-defendants fraudulently appropriated, wilfully abstracted and converted the Severance Fund monies, funds, securities and assets and property of Local 224 on November 2, 1959 is abundantly clear from the evidence.

The Experience Rating Refunds with the exception of the $287.68 refund for the year 1958, which was intercepted by Dorothy Johnson were not recorded in the local's books but were segregated and placed in the Severance Fund Line Drivers Local 224 bank account [Exs. 1, 33, R. T. 922, 923].

This was consistent with the concealment from the rank and file members of the existence of the Severance Fund and the concealment of the fact that the local was receiving Experience Rating Refunds [R. T. 1626, Ex. 44].

Joe McBride and Wassen were included in the Severance Fund even though they were not business

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[8]It should be noted that although Gladys Rang, the office manager of Local 224 had the power to sign Severance Fund checks there was no showing that she could do so without the authorization of appellants. There is also no showing that Miss Rang ever exercised any dominion or control over the Severance Fund bank account.

agents and had been employed less than three years, thus under any stretch of the term "covered employee" as used in the Severance Fund Agreement they were not eligible [Ex. E]. The purported minutes of the Severance Fund themselves show that on April 22, 1957, McBride and Wassen were members in spite of the fact that they had been employed less than two years before [Ex. F]. This inclusion of McBride and Wassen contrary to the agreement itself is only compatible with a desire on the part of appellants to buy silence from the only other full time male employees.

Contrary to the advice of appellant's own attorney the fact that the distribution of the segregated fund was concealed from the general membership by the systematic exclusion from the general membership discussion on September 27, 1954 of any reference to the Severance Fund. This fact is patently clear from the omissions of the words "and Trustees of Severance Fund" and "the Severance Fund and" from the minutes of the general membership meeting of that date [Ex. 44].

Finally the missing records [Ex. 103, R. T. 363, 390, 391, 895, 896, 1706, 1707]; the concealment from the union attorneys [R. T. 1495, 1496]; and the false caption used to disguise the payment to Larry McBride [Ex. 2] are indicia of fraud which cannot be ignored.

The distribution to the use of appellants and the others of the segregated funds was the first exercise of dominion or control over these funds exercised by appellants and their co-defendants; this was the first step beyond the "locus poenitentiae".

As quoted in *People v. Swanson,* 174 Cal. App. 2d 453, 344 P. 2d 832, 835, 836 (1959):

> [N]otwithstanding the appellant may have had authority to make a sale of the cotton alleged to have been embezzled, yet if he sold the same with the formed intention to defraud the owner, and to convert it to his own use and benefit, he is as much guilty of embezzlement of the cotton as if he had no authority to make such sale. What is embezzlement? A fraudulent appropriation of the property of another, by a person to whom it has been entrusted. There is no settled mode by which this appropriation must take place, and it may occur in any one of the numberless methods which may suggest itself to the particular individual. The mode of embezzlement is simply matter of evidence, * * *.

Appellee submits that based upon the evidence of this case the Severance Fund was appropriated and converted to the use of appellants on November 2, 1959, the date on which the distribution was made.

It is submitted that the term "converts" as used in Section 501(c) consistent with the requirements established in *Morissette v. United States,* 342 U. S. 246 has the same meaning as does the term "converts" under the law of Torts. *Brown v. Bullock,* 194 F. Supp. 207, 229 (S. D. N. Y. 1961).

It is therefore unnecessary to meet appellants *ex post facto* argument with additional arguments based upon the fact that appellants aided and abetted their nonappealing co-defendant in the commission of an offense which Barnes was unable to commit without their as-

sistance. It is also unnecessary to argue that the local retained an interest in the fund through the "forfeiture clause" in the face of the overwhelming facts demonstrating the union's complete title to the Refunds and their fruits.

Appellants did not urge at the trial nor do they here urge that the Severance Fund was instituted or maintained pursuant to a negotiated contract whereby Local 224 was under an obligation to make any payments to the Severance Fund. In fact the Severance Fund agreement itself recites in substance that all payments made thereto would be voluntary. Accordingly, appellants' argument based on the following authority cited in their brief must fail:

Carter v. United States, 353 U. S. 210, 77 S. Ct. 793, 1 L. Ed. 2d 776 (1957);

Glandzis v. Callincos, 140 F. 2d 111 (2d Cir. 1944);

Hooker v. Hoey, 27 F. Supp. 489 (D. C. S. D. N. Y. 1939);

Kennet v. United Mine Workers of America, 183 F. Supp. 315 (D. C. 1960);

Pacific American Fisheries v. United States, 138 F. 2d 464.

In each of the above cases the courts attempted to ascertain the rights of parties under negotiated contracts which were voluntarily executed. The courts have always been liberal in finding such compensation, based on these circumstances, to be wages.

The evidence in this case as demonstrated earlier in this brief disclose forcefully that the segregation of the Experience Rating Refunds was in no way connected

with the negotiation of a contract of employment or for wages. Such an argument by appellants would be hostile to their right to distribute the fund without the approval or acquiescence of Dorothy Johnson, who had been the office manager of the local for some 2½ years prior to the distribution, and approval or acquiescence of the union itself. The terms of the California Civil Code, Section 2258, provides:

> "§2258. Obedience to declaration of trust *Trustees must obey declaration of trust.* A trustee must fulfill the purpose of the trust, as declared at its creation, and must follow all directions of the trustor given at that time, except as modified by the consent of all parties interested, in the same manner, and to the same extent, as an employee."

It is abundantly clear that the fiduciary duty imposed by Section 501(a) of Title 29, United States Code, which was undoubtedly discussed with the union attorneys would, appellee submits, prevent the distribution of the Severance Fund, under these circumstances, as wages [R. T. 1495, 1499, 1638, 1639, 2109]. Any resolution to that effect would be contrary to public policy.

See also:

People v. Williams, 153 Cal. App. 2d 275, 314 P. 2d 493 (1957).

C. There Was Sufficient Evidence to Sustain the Conviction of Appellants as to Count Two of the Indictment.

Count Two of the Indictment was based upon a check in the amount of $220.00 drawn on the local's bank account Ex. 2]. Resolving all factual doubts in

favor of the Government and viewing the evidence in the light most favorable to support the judgment appellee submits that the evidence is sufficient to sustain appellant's conviction on this count.

With relation to Count Two, appellants appears to be skewed on the horns of a dilemma of their own creation. Much of appellants' brief is devoted to arguing the proposition that the Severance Fund was wrongfully taken prior to a time when such taking was a federal offense. There was no dispute in the court below nor do appellants contend here that the $220 paid to Larry McBride was for any obligation other than for his services rendered in connection with the winding up and distribution of the severance Fund. It is obvious that if the Severance Fund was wrongfully taken prior to the time that such taking constituted a federal offense the payment of the cost of distribution of this fund cannot be charged to the victim of the wrongful taking. It is sufficiently clear so as not to require argument that if the Severance Fund was wrongfully taken at any time that the local should not be charged with the expense of the distribution.

Assuming for the purpose of argument only that the Severance Fund was not wrongfully taken from the union and accepting for the purpose of argument appellants' contention that the union had no interest in the Severance Fund trust it is again patently obvious that the cost of distribution of such a trust fund is not a proper charge to the union.

A document purportedly executed on September 30, 1959 and entitled Agreement for the Termination of Trust and Distribution of Assets, which was signed

by the appellants after consultation with attorney Richard E. Perkins, states in pertinent part as follows [Ex. G]:

> "It Is Agreed:
>
> "1. The trust established by the 'Agreement and Declaration of Trust—Severance Fund Line Drivers Local 224, dated April 1, 1955, is hereby terminated, subject to the winding up and distribution of the trust assets.
>
> "2. The net assets of the trust, after paying any trust expenses, including attorney fees and any other expenses of winding up, shall be distributed by the trustees to the present beneficiaries of said trust or their nominees. . . ."

The appellants each knew Larry McBride and knew that he had never performed any services directly for Local 224 nor had he ever performed any audits for Local 224 or any labor union. In addition, Larry McBride was not an arbitrator and had not performed any arbitration for Local 224 or any other union [R. T. 172, 175, 179]. Both Larry McBride and Richard Perkins billed the Severance Fund for their services in connection with the distribution consistent with the agreement [Ex. G, R. T. 169, 170, 171]. Prior to the December 1, 1959 special Executive Board for the approval of the bills, appellant Woxberg instructed the office manager Dorothy Johnson to include a payment to "Larry McBride—Arbitration Audit—$220" [R. T. 890, 993]. Payment to McBride was approved at the December 1, 1959 Executive Board meeting and a check drawn on the local's bank account was issued to McBride in the amount of $220. The check was

signed by both of the appellants and bore the caption in the upper left hand corner "Arbitration Audit 220.00".

It is submitted that there is ample evidence to support the conviction of appellants as to Count Two of the Indictment.

D. There Was Sufficient Evidence to Sustain the Conviction of Appellant Woxberg as to Counts Nine and Ten of the Indictment.

Counts Nine and Ten of the Indictment were based upon two checks issued by Local 224, one in the amount of $355.00 and the other in the amount of $105.86. Both checks were issued to Frank's Automotive Service [Exs. 9 and 10].

At trial it was shown by the evidence that Woxberg purchased a jeep in Las Vegas which was badly in need of repairs [R. T. 2005]. Pursuant to Woxberg's request Dykes towed the jeep from Las Vegas to Los Angeles and took it to Frank's Automotive Service operated by Frank Whipple [R. T. 2007, 2008]. After reconstructing the jeep Whipple billed Avis M. Dykes, appellant's wife, for the work. The face amount of the bill was $468.86 [Ex. 24]. The first check in the amount of $355.00 was drawn on the union's account on April 4, 1961. On April 4, 1961 while the work on the jeep was in process, Dykes obtained a $355.00 check from the local payable to Frank's Automotive Service. On April 15, 1961, Frank's Automotive Service's bill charging Avis M. Dykes was submitted to Dykes. Dykes took this bill to the local where it was given to Woxberg. Woxberg then obtained a check in the amount of $105.86 from the local and enclosed it with a transmittal letter which reviewed the entire

transaction [Ex. 25]. A short time later Woxberg got Dykes to take the jeep back to Frank's Automotive Service for further repairs. On this occasion Dykes paid for the repairs with his gasoline credit card issued to him by the union [R. T. 2113, 2124, 2207, 2208, Ex. 71, AG-1, 42, 104].

Prior to taking the jeep to his mountain hunting cabin Woxberg had it reupholstered, painted and had a new top installed [R. T. 360, 361, 1539, 1541].

Prompted by the criminal investigation which had uncovered the Frank's Automotive Service transaction, Woxberg repaid the union a year later [R. T. 2020, 2021].

It is submitted that viewing this evidence in a light most favorable to the Government there is sufficient evidence upon which to sustain Woxberg's conviction on Counts Nine and Ten.

E. There Was No Prejudicial Error in the Giving or Refusing of Instructions.

Appellant urges as error the court's refusal to give defendants' proposed jury instructions No. 34, No. 38 and No. 47. The appellant also claims that the court erred in giving the following instruction which has already been discussed at length under a previous argument included in this brief:

> "Now I want to go back and discuss with you for just a moment or two the indictment. Count I concerns the severance fund and a large part of the testimony in this case concerns count 1, the severance fund. I told you, I think I told you, I may not. You know that memory is tricky and I don't know whether I told you or not.

I told the lawyers, but I think I told the lawyers in your presence, that one of the issues here to be determined by you is who owned the severance fund. Was the severance fund owned by the union or was it owned by the severance fund itself, by the trust? There is no dispute in this case that the money that went into the severance fund belonged to the union. It was union refunds. We have in evidence the checks and I have the checks before me, and the checks are made payable to Line Drivers Local 224. So when these checks were issued and delivered, they belonged to the union.

"They were deposited in the fund account. Did that deposit in the fund account mean that the money was transferred over to the fund, or did it belong to the union?

"Now, in determining this question, you can go back to Exhibit E, which is the agreement and declaration of trust, and you may determine now from this agreement that there was a transfer of these funds from the union to the trust. The agreement says:

" 'The membership by resolution duly adopted voted to make certain contributions to a severance fund to provide a measure of security to certain officers or paid employees.'

"And then Local 224 has directed that insurance refunds payable to it from time to time shall be contributed for the aforesaid purpose, together with such other moneys as may be designated for that purpose in the future.

> "Now, here is a question of fact. Here is the agreement. It is for you to determine in your own mind whether or not these funds were transferred to the severance fund. If they were, then you will have to find the defendants not guilty on count I, because the charge is that they stole and converted the money from the union and, of course, if the union didn't have the money, then they can't be guilty of stealing and converting the money."

Appellants omit the court's concluding remark with relationship to this charge which was as follows:

> "So in considering Count One, you are going to have to determine whether or not this money belonged to the union or belonged to the Severance Fund." [R. T. 2779, lines 23 to 25].

Appellants have also failed to comply with Rule 18(d) of the Rules of the United States Court of Appeals for the Ninth Circuit which provides in pertinent part as follows:

> "When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused, together with the grounds of the objection urged at the trial."

Perhaps appellants' failure to comply with Rule 18(d) is in some way connected with appellants' failure to comply in the trial court with Rule 30 of the Federal Rules of Criminal Procedure which provide in pertinent part as follows:

> "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

In appellant's brief at page 23 it is asserted that the above instruction was objected to by appellants citing R. T. 2789, line 19 to page 2790, line 16. The following is the colloquy which took place between the court and Mr. Cooper, attorney for appellant Dykes:

> "The Court: Do the defendants have any objection to any of the instructions I read to the jury?
>
> "Mr Cooper: I think we have discussed it before, but since it is my duty to answer your Honor's question, on behalf of the defendants whom I represent, we respectfully request that we feel it is your Honor's duty to instruct that the law is that when title is in the trustees of a trust, under the law they are bound to find the defendants not guilty. I am certain, also, if your Honor please, that your Honor unintentionally—
>
> "The Court: Didn't I instruct the jury if they found this money had been transferred to the fund, that the defendants are not guilty?
>
> "Mr Cooper: Yes, your Honor did, but there is no contradictory evidence that that is a fact.
>
> "The Court: Well, there is a contradiction, because there is an interpretation of this agreement.
>
> "Mr. Cooper: All right, your Honor.
>
> "The Court: There is a contradiction. Otherwise, we wouldn't be here.
>
> "Mr. Cooper: I realize that. Counsel and I have discussed this before, and I was bound to call it to your attention." [R. T. 2789, 2790].

Under appellee's first argument included in this brief the contradictions noted by the court were discussed at length. Accordingly, in the interest of brevity they will not be again restated here.

With regard to Defendants' Proposed Jury Instruction No. 34, appellants again failed to comply with Rule 18(d) and Rule 30 of the Federal Rules of Criminal Procedure. The following is the discussion which occurred prior to the charge between counsel and the court with relation to this instruction:

"The Court: Your instruction No. 34, 'If you entertain a reasonable doubt that said funds belonged to said union, you are then instructed you cannot return a verdict on count 1 for the reason that in such circumstances, as a matter of law . . .' Supposing they have a reasonable doubt whether or not these funds belonged to the severance fund.

"Mr. Cooper: Well, your Honor please, they are only charged with embezzling from the union. They are not accused of embezzling from the severance fund.

"The Court: That's right. Mr. Murphy, have you got anything to say about that?

"Mr. Murphy: I object to the instruction. I don't think that in fact is the law.

"The Court: Mr. Murphy, I am sorry, but I was reading and I didn't get what you said. Will you repeat it?

"Mr. Murphy: The instruction is particularly objectionable in this language, 'As a matter of law, title in such funds would be in the severance fund and not Local 244.' That is not the law, your Honor, I submit to the court.

"Mr. Cooper: I don't follow counsel's reasoning.

"Mr. Murphy: Are we reading from the same instruction?

"Mr. Cooper: Yes. 'You are instructed that if you find from all the evidence that on or about November 2, 1949, funds in the sum of approximately $35,178 had been deposited in the severance fund, Line Drivers Local 224 trust, as authorized in the rules or by-laws of said Local 224, or if you entertain a reasonable doubt that said funds belonged to said union, you are then instructed that you must return a verdict of not guilty on count 1 for the reason that in such circumstances, as a matter of law, title in such funds would be in the severance fund and not Local 224, and, therefore, there could be no theft or embezzlement of union funds as charged in the indictment."

"Your Honor will recall the argument we made at the time we made the motion for acquittal at the conclusion of the Government's case. We contend as a matter of law the prosecution's evidence showed that the title was in the fund. Your Honor suggested that that was a question for the jury.

"The Court: I am going to tell them that, too.

"Mr. Cooper: And that is exactly what this instruction tells them.

"The Court: I don't like your wording. I am going to refuse the instruction, but I am going to comment to the jury along this line in my own way. I think I can cover that. I am not going to give this particular instruction because I don't like the way you have set it up.

Mr. Cooper: I note an exception. I understand we have to take exceptions." [R. T. 2694 to 2696].

No exceptions or objection was made by either of the appellants to the omission from the charge of their proposed instruction No. 34 prior to the time the jury retired to consider the verdict. It is clear from a reading of the instruction itself that the language is confusing and would have been repetitious if given with the charge discussed above.

It should be noted that appellant Woxberg did not object to the refusal of the court to include proposed instruction No. 34.

Defendant's Proposed Instruction No. 34 was refused by the court. The proposed instruction No. 34 provides as follows:

> " 'You are instructed that if you find from all the evidence that on or about November 2, 1959, funds in the sum of approximately $35,178 had been deposited in the severance fund, Line Drivers Local 224 Trust, as authorized in the rules or by-laws of said Local 224, or if you entertain a reasonable doubt, that said funds belonged to said union, you are then instructed that you must return a verdict of not guilty on count 1 for the reason that in such circumstances, as a matter of law, title in such funds would be in the severance fund and not Local 224, and, therefore, there could be no theft or embezzlement of union funds as charged in the indictment.' " [C. T. 172].

The court also refused to give appellants' proposed Instruction No. 38. This instruction reads as follows:

> "If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which

points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt.

You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt." [C. T. 175].

Once again appellants failed to comply with Rule 18(d) and Rule 30 of the Federal Rules of Criminal Procedure.

At the conference on instructions to be given the following colloquy took place with relation to Proposed Instruction No. 38: [R. T. 2697, line 2 through 2698, line 7].

"The Court: I am going to give the federal one rather than this one. I think the Ninth Circuit has turned down 38. 'If the evidence in this case is susceptible of two constructions or interpretations.' Is that right, Mr. Murphy?

"Mr. Murphy: Yes, your Honor.

"The Court: I think the Ninth Circuit has turned us down on that instruction.

"Mr. Neeb: May I be heard?

"The Court: Yes.

"Mr. Neeb: This is another way of talking about the reasonable doubt rule.

"The Court: We have harped on the reasonable doubt from the very beginning to the end and it will be mentioned another half dozen times.

"Mr. Neeb: What instruction would there be given on the rule of circumstantial evidence?

"The Court: I read you an instruction I usually give on circumstantial evidence.

"Mr. Neeb: That is the one in the book?

"The Court: That is the one in the book. If I remember rightly, Mr. Neeb, I don't know, but it seems to me since I have been trying this case the Ninth Circuit has come down with an opinion in which it criticizes this instruction.

"Mr. Neeb: I don't know what it is, because I didn't see it.

"Mr. Murphy: It was our case.

"Mr. Neeb: What is the citation:

"The Court: I don't know whether you lost it or won it.

"Mr. Murphy: We won it, fortunately, your Honor.

"The Court: So I will refuse 38. . . ."

A reading of the total charge reveals that the jury was properly instructed as to reasonable doubt.

As stated in *Taylor v. United States*, 320 F. 2d 843, 851 (9th Cir. 1963):

> "The jury was fully instructed concerning the necessity of finding the facts against appellant beyond a reasonable doubt in order to convict. The trial court did not err in refusing to give this further instruction on the point."

In *Strangway v. United States,* 312 F. 2d 283 (9th Cir. 1963), this Court held that in similar circumstances the refusal to give an instruction similar to appellants' proposed instruction No. 38, was not error.

Appellants assert that the refusal of the court to give Defendants' Proposed Instruction No. 47 was error. Again appellants do not comply with Rule 18(d) and Rule 30 of the Federal Rules of Criminal Procedure. This instruction provides as follows:

> "You are instructed that as matter of law the proceeds from funds resulting from contributions made to a pension plan are when distributed a form of wages. As a result if you find from the evidence in this case that the Executive Board of Local 224 had the power in itself to set wages and conditions of employment of employees of the Union then in that event the Executive Board was empowered to provide a pension plan and that they did not have to go to the general membership for that purpose.
>
> "Therefore if you find from the evidence in this case that the Executive Board alone set up a pension plan for payment at severance of employment to the paid employees this was doing only what they had a right to do."

For the reasons already set forth in appellee's earlier argument regarding the issue of whether or not the distribution of the Severance Fund was a form of wage it would appear appropriate to conclude that Proposed Jury Instruction No. 47 was properly refused. It should also be noted with relation to Proposed Jury Instruc-

tion No. 47 that the term "pension plan" as used therein is nondescriptive of the so-called Severance Fund and as such would be confusing to the jury.

An examination of appellants' proposed instructions Nos. 34 and 47 and that portion of the court's charge specifically excepted to in appellants' brief discloses that these tailored instructions are directed solely at Count One of the Indictment which was based on the so-called Severance Fund distribution, and not as to Counts Two, Nine and Ten. In reviewing instructions for prejudicial error this court has set forth in *Gilbert v. United States,* 307 F. 2d 322 (9th Cir. 1962) at page 326:

> "Having in mind the provisions of Rule 52(b) and the teachings of the above mentioned cases and others, we have examined the instruction of which appellants complain. We can find no plain error therein affecting the substantial rights of the appellants, nor can we find any error which would result in a manifest miscarriage of justice. We thus adhere to Rule 30 and refuse to delve into the merits of the contentions appellants make with respect to the instruction.
>
> "From an examination of the entire record it appears that the appellants were fairly tried and properly convicted of the crimes with which they were charged."

Appellee urges that the entire record reveals that appellants were fairly tried and properly convicted of the crimes with which they were charged.

VII.

Conclusion.

There being no error the convictions of the appellants Homer L. Woxberg, Sr. and Wayne Franklin Dykes should be affirmed as to all counts.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Richard A. Murphy